88-1450 (2)

Supreme Court, U.S.
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CLERK

NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

DURA-CORP, a Pennsylvania Business Corporation,

Appellant

vs.

RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

Appellee

APPENDIX

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4-10pp

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-3519 and 88-3546

DURA-CORP, A Pennsylvania Business Corporation,

Appellant

v.

RISI STONE, LTD., a Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

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On Appeal From the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 86-1610)

District Judge: Maurice B. Cohill, Jr.

Submitted Under Third Circuit Rule 12(6)
December 9, 1988

Before: SLOVITER and BECKER, Circuit Judges and FULLAM, District Judge*

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*Hon. John P. Fullan, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

S/Delores K. Sloviter
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Dec. 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DURA-CORP, a Pennsylvania Business Corporation,	)	
Plaintiff	)	C.A. No. 86-1610
v.	)	
RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation,	)	
Defendants	)	

ORDER

AND NOW, to-wit, this 1st day of July, 1988, for the reasons set forth in the accompanying opinion, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1) Defendant's Motion to Stay Proceedings and Compel Arbitration be and hereby is GRANTED; and

2) The dispute raised by the complaint filed in the above-captioned action shall and hereby is to be arbitrated in Ontario,

Canada, under the provisions of the Arbitration Act of the Province of Ontario.

s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DURA-CORP, a Pennsylvania Business Corporation, Plaintiff	)	C.A. No. 86-1610
v.	)	
RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, Defendants	)	

OPINION

COHILL, C.J.

Presently before us are defendants' motions: (i) to stay proceedings and compel arbitration; (ii) in the alternative, to dismiss for failure to state a claim or for lack of subject matter jurisdiction; and (iii) also in the alternative, for a more definite statement. Defendants are both Canadian corporations. Plaintiff, Dura-Corp, a Pennsylvania corporation, filed a complaint seeking a declaratory judgment. For the

reasons set forth below, we will grant the defendants' motion to stay proceedings and compel arbitration. Defendants' remaining motions are thereby rendered moot.

Background

On November 16, 1983, defendant Risi Stone, Ltd. ("Risi Stone"), as licensor, entered into a written licensing agreement (the "Licensing Agreement") with Thomas R. Eddy, Kenneth R. Dehus, Angelo Risi and Anthony Risi, as licensees. By the Licensing Agreement Risi Stone granted to the licensees the exclusive right, license and privilege of manufacturing and selling articles embodying a certain retaining wall system in which Risi Stone has an ownership interest by virtue of certain Canadian patents and copyrights and possession of related trade secrets. The Licensing Agreement limited the scope of the licensees' exclusive right, license and privilege insofar as they could only manufacture and sell the aforementioned articles

under the trade name "Dura-Crib" and only within the states of Pennsylvania, Ohio, Maryland and West Virginia.

Subsequent to the execution of the Licensing Agreement, the licensees formed Dura-Corp, a Pennsylvania business corporation with its principal place of business in Pittsburgh. The original licensees subsequently assigned their rights under the Licensing Agreement to Dura-Corp pursuant to an assignment clause and now they now hold various ownership interests in the corporation as consideration for the assignments. Apparently Angelo and Anthony Risi have a 20% interest in Dura-Corp., Kenneth Dehus, a 20% interest and Thomas R. Eddy and unnamed others, a 50% interest, but with Eddy being permitted to vote 60% of the Dura-Corp stock. See Complaint, Exhibit B.

This action seeks a declaratory judgment from the Court in the alternative:

1. That the patent license contained in the License Agreement expressly grants to the Plaintiff, its successors and assigns, the right to manufacture, distribute and sell all articles embodying the Invention evidenced by United States Patent Number 4,490,075; or

2. That the said License Agreement was subsequently modified to include all such articles; or

3. That the Defendants, by virtue of their conduct as aforesaid, have impliedly granted to the Plaintiff a license to manufacture, distribute and sell all such articles.

Complaint, 6.

On December 19, 1986, the defendants filed the present motions. With respect to their motion to stay proceedings and compel arbitration, defendants direct us to paragraph 28 of the Licensing Agreement (Complaint, Exhibit "A") which they allege obligates the parties to submit any disputes to arbitration. Paragraph 28 provides:

ARBITRATION

Any dispute, difference or question arising between Risi (Stone) and

> Licensee concerning the interpretation, construction, meaning or effect of this agreement or any part thereof shall be referred to a single arbitrator if Risi and Licensee agree upon such arbitrator or failing such agreement to a board of three arbitrators, one to be appointed by Risi one to be appointed by Licensee and one to be appointed by the two arbitrators so named by Risi and Licensee. The provisions of the Arbitrations Act of the Province of Ontario shall be applicable.

In connection with this arbitration provision, defendants also direct our attention to the Federal Arbitration Act (the "Act"), 9 U.S.C. §§ 1-14, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") 9 U.S.C. §§ 201-208. Defendants argue that the Act and/or the Convention give this Court jurisdiction and authority to enforce the arbitration provision in the Licensing Agreement. In response, plaintiff has argued, in a series of briefs, that: (1) the arbitration provision is legally nonenforceable; and (2) the underlying declaratory judgment action is

outside the scope of the arbitration provision.

Discussion

A. The Federal Arbitration Act and the Conference on the Recognition and Enforcement of Foreign Arbitral Awards

The Federal Arbitration Act at 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 1 defines "commerce" as including commerce among the several States or with foreign nations. As such, the Licensing Agreement, which allocates certain proprietary rights between a Canadian and a Penn-

sylvania corporation, falls within the terms of 9 U.S.C. § 2 as a "contract evidencing a transaction involving commerce." See Caribbean Steamship Co. v. La Societe Navale Caennaise, 140 F.Supp. 16 21 (E.D. Va. 1956) ("A 'transaction involving commerce' is a broad term covering trade generally between citizens of this country and subjects of a foreign country, including the purchase and sale of property of all kinds and descriptions."), aff,d, 239 F.2d 689, 693 (7th Cir. 1956) (a contract between foreign and American corporations upon which the American corporation is liable, and of which it is in both an essential party and the real beneficiary involves commerce with a foreign country).

9 U.S.C. §202 describes those agreements to which the convention's provisions apply; an arbitration agreement falls under the Convention if it arises out of a legal relationship, whether contractual or not, which is considered as commercial, including a

transaction, contract or agreement defined by 9 U.S.C. §2. As we have already found that the Licensing Agreement is covered by § 2, the Convention necessarily applies because of specific incorporation of § 2 in the defining terms of § 202. 9 U.S.C. §201 further provides that the Convention will be applied by the United States, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting state. This additional requirement poses no difficulty here, however, as Canada has been a contracting state since May 12, 1986. Cf. Fertilizer Corp. of India v. IDI Management, Inc., 517 F.Supp. 948 (S.D. Ohio 1981) (Convention applied even where underlying contract was executed before contracting state adopted Convention), reconsideration denied, 530 F.Supp 542 (S.D. Ohio 1982).

The plaintiff does not contest that either the Act or the Convention apply to the Licensing Agreement pursuant to 9 U.S.C. §§ 2

and 202, respectively. See Plaintiff's Brief in Opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration, Etc., p. 4 n.3 ("Moreover, Plaintiff agrees with the Defendants that the arbitration provision arose out of a commercial legal relationship described in 9 U.S.C. § 2 as a 'contract evidencing a transaction involving commerce' (9 U.S.C. § 201; Defendant's Brief, p. 4 et seq.).").

9 U.S.C. § 3 addresses the authority of a district court to order a stay under the Act:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the application for the stay is not in default in proceeding with such arbitration

As evidenced by the requirement that a suit be brought or pending in a court, a district court must have independent subject matter jurisdiction in order to consider the provisions of the Act. We have subject matter jurisdiction to consider the question of arbitration under the Federal Arbitration Act because of independent bases for jurisdiction, i.e., federal question (patent) and diversity of citizenship; the scope of our review is limited but we are not deprived of jurisdiction entirely. See Else v. Inflight Cinema Intern, Inc., 465 F.Supp 1239 (W.D. Pa. 1979).

9 U.S.C. §206 has been construed as providing similar authority to a district court having jurisdiction under the Convention. See Becker Audoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH., 585 F.2d 39, 42 n. 4 (3d Cir. 1978). Contrary to the Act, any district court of the United States has original jurisdiction of any action "falling under the Convention," as defined in §202. 9

U.S.C. §203. Thus, we have original jurisdiction to consider the provisions of the Convention. Venue in the Western District of Pennsylvania is also proper under the Convention, pursuant to 9 U.S.C. § 204, because an action was brought here with respect to the controversy between the parties. Section 204 provides that venue is proper in any court having jurisdiction in which, save for the arbitration agreement, an action or proceeding with respect to the controversy between the parties could be brought.

The authority of a district court to compel arbitration is provided by the Act in 9 U.S.C. §4 and by the Convention in 9 U.S.C. § 206. Under the Act, a district court is required to issue an order compelling arbitration once it is satisfied that an agreement to arbitrate exists and that no waiver of this agreement occurred. Such authority is limited, however; a district court can only compel arbitration in its own district. See Econo-Car International, Inc. v. Antilles

Car Rentals, Inc., 499F.2d 1391 (3d Cir. 1974); Oil Basin Ltd. v. Broken Hill Proprietary Co. 613 F.Supp 483 (S.D.N.Y. 1985). The Convention, pursuant to § 206, gives a district court permissive authority to order that arbitration be held at any place provided for in the arbitration agreement, whether within or without the United States. See Oil Basin Ltd., 613 F.Supp at 486 (legislative history of § 206 discussed).

B. Plaintiff's Objection to the Enforceability of the Arbitration Provision.

As previously noted, plaintiff's objections to the defendants' present motion do not concern the applicability of the Act or Convention to the Licensing Agreement is legally unenforceable. Plaintiff contends that defendants' claim for relief under the Act and Convention is "anomalous" because the arbitration clause requires that the Arbitration Act of the Province of Ontario apply.

Plaintiff argues that the "plain meaning" of this requirement in the arbitration clause prevents defendants' resort to the Act or Convention; that is, having selected the Ontario Arbitration Act, defendants cannot now seek to enforce the agreement under the Act or Convention. Counsel for plaintiff thus advises us that "the Court cannot apply the Federal Arbitration laws in defiance of the terms of the contract... or rewrite the parties' agreement." Plaintiff's Brief, at 4.

Clearly, it is plaintiff's own arguments which merit the description "anomalous." It is remarkable that plaintiff would urge the Court to disregard arbitration provision in the Licensing Agreement based on its "plain meaning," asserting that the Ontario Arbitration Act can provide the only relief for defendants; not only does this argument strain the plainer meaning of the arbitration provision - that any disputes concerning the Licensing Agreement are to go to arbitration

- but it evidences a complete disregard or misunderstanding of the relationship between an agreement to arbitrate in accordance with certain specified laws of arbitration and the mechanisms provided in the Act and Convention to enforce such an agreement. A choice of governing arbitration principles and the laws which give effect to such a choice are not mutually exclusive.

The Act and the Convention both reflect a national policy favoring the arbitration of disputes. See Moses H. Cone Hospital vs. Mercury Construction Corp., 460 U.S. 1, 24 (1983), 103 S.Ct. 927, 74 L.Ed. 2d 765, 785; Becker Autoradio, 585 F.2d at 44 ("There is, of course, a strong policy in the federal courts favoring arbitration, especially in the context of international agreements."). The Act and Convention were adopted to provide enforcement mechanisms for arbitration agreements. See Mitsubishi Motors v. Soler Chrysler-Plymouth, ____ U.S. _____, 105 S.Ct. 3346, 3354, 87 L.Ed. 2d 444, 454 (1985)

("As this Court recently observed, '(t)he preeminent concern of Congress in passing the Act was to enforce private agreements onto which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'"); Scherk v. Alberto-Culver Co, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457, 41 L.Ed.2d 270, 281 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements on international contracts..."). The Act and Convention have created a body of federal substantive law; such substantive principles do not govern actual arbitration arbitration, but rather establish and regulate the duty to honor an agreement to arbitrate. Mitsubishi Motors, _____ U.S. at _____, 105 S.Ct. at 3354, 87 L.Ed.2d at 454; Moses H. Cone Hospital, 460 U.S. at 25 n. 32, 103 S.Ct. at 942, 74 L.Ed.2d at 786. Consequently, the fact that

the defendants seek to resort to the Act and Convention is in no way precluded by the arbitration provision's mandate to apply the Ontario Arbitration Act. The arbitration clause in question speaks to the substantive rules intended to govern arbitration, while the Act and Convention provide rules to enforce agreements to arbitrate and, more specifically, agreements to arbitrate in accordance with certain guidelines.

Indeed, we question how plaintiff's counsel could have argued in good faith that it is legally impossible for the Court to apply the Act or Convention because of the Licensing Agreement's choice of arbitration law, when no legal precedent supports this claim. Plaintiff cites Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775 (3d Cir. 1984), in connection with its concluding statement as to "legal impossibility." However, Sharon Steel in no way even alludes to such a position. Instead the court there explicitly recognizes the federal policy

favoring arbitration. Id. at 77-78. Moreover, the court refers to the previous Third Circuit decision in Becker Autoradio in which the Court of Appeals did not even acknowledge an issue as existing in connection with the applicability of the Act and Convention, even though the contract in question directed the application of German law and the arbitration clause within the contract required that the arbitration court was to sit in Germany and be governed by the Rules of Procedure of the International Chamber of Commerce, Paris. Id. at 777, n. 6. Our own research has revealed several cases from various courts in which similar choices of foreign arbitration laws did not preclude the courts' application of the Act or Convention as a means of enforcing the agreements to arbitrate. See, e.g., Scherk v. Alberto-Culver Co., supra (Act applied to enforce arbitration clause which required that the rules of the International Chamber of Commerce, Paris, France govern the arbitration); S.A. Mineracao Da

Trindade-Samitri v. Utah International, Inc., 745 F.2d 190 (2d Cir. 1984) (Act and Convention applied to enforce arbitration provision which directed that arbitration be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce); Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems Company, 643 F.2d 863 (1st Cir. 1981) (Act applied to contract to be construed and interpreted in accordance with French law and used to enforce arbitration provision therein which directed that all disputes arising in connection with contract be settled by arbitration under the rules of the International Chamber of Commerce in Lausanne, Switzerland). The arbitration provision's reference to the Ontario Arbitration Act no more prevents our application of the Act or Convention than the arbitration provision as a whole deprives us of jurisdiction. See Else v. Inflight Cinema Intern, Inc., 465 F.Supp. 1239 (W.D. Pa.

1979) (existence of arbitration clause does not deprive district court of jurisdiction; instead, arbitration clause gives rise to court's application of the Act); Andros Compania Maritima, S.A. v. Andrie & Cie, S.A., 430 F.Supp. 88, 94 (S.D.N.Y. 1977) ("(A) contractual provision for arbitration abroad, standing alone, scarcely precludes resort to our courts..." - forum selection clause in arbitration provision will be judicially honored through parties' resort to the Act or Convention.

In connection with plaintiff's aforementioned "argument" concerning legal impossibility, it is argued that the Ontario Arbitration Act is also inapplicable to the present proceedings or any proceedings in the United States either because: (1) applicable choice of law rules direct that Pennsylvania substantive law applies, or (2) the defendant is precluded from using the Ontario Act because it first invoked the Federal Arbitration laws. Plaintiff's Brief at 4 n.2. and 4

n.4. Plaintiff advances this claim in order to buttress its argument as to the enforceability of the arbitration provision. Plaintiff would have us believe that defendants can only attempt to enforce the arbitration provision under the Act or Convention, but that the Act or Convention cannot apply here because of the choice of arbitration law. Although we agree that the Act and Convention provide the only mechanisms by which a court can enforce the agreement to arbitrate, as we have previously explained, the Act and Convention are not legally inapplicable and the arbitration provision is not legally unenforceable. Thus, to some extent, plaintiff's arguments concerning the applicability of the Ontario Arbitration Act are not longer of direct consequence to defendants' instant motion. However, the arguments concerning applicable substantive law misconstrue the Court's authority under the Act and Convention.

While our review and ruling on all of

plaintiff's arguments on applicable law probably gives those arguments more credit than they are due, in the interest of making a complete ruling we nevertheless proceed. Plaintiff prefaces its arguments against the application of the Ontario Arbitration Act on our use of the Act and Convention, arguing that Canadian law cannot apply to this action because the arbitration provision in the Licensing Agreement does not provide for a Canadian forum. Only then, plaintiff argues, may the provision have been enforceable under § 206 of the Convention. The Federal Arbitration Act apparently is of no concern, according to plaintiff, as it does not provide alternative relief, i.e., the Convention is controlling. Id. at 4 n.3. Without a Canadian forum specified, plaintiff agrees that jurisdiction lies with this Court under the Convention, and that the Federal Arbitration laws would be applicable, but, finally, that the substantive laws of Pennsylvania would control under the principles of Erie

Railroad Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938).

To the extent these arguments draw into question this Court's authority to enforce the arbitration clause at issue under both the Act and the Convention, we find that we have concurrent authority under both where both are found to be applicable. See Becker Autoradio, supra (Act and Convention concurrently applied to enforce arbitration clause). We have previously explained and recognized the applicability of both the Act and Convention to this case, therefore such concurrent authority exists here. We acknowledge that when both apply, as in this case, the Convention is controlling when any conflict between the two exists. 9 U.S.C. §208. However, this does not mean that the Convention is the sole basis for our authority to act here. Furthermore, prior to our finding that both the Act and Convention are applicable to the Licensing Agreement, these chapters did offer alternative avenues of

relief. If, for example, the Convention were found inapplicable because of reciprocity was lacking between the United States and Canada under the Convention, the Act would then provide an alternate and the sole basis for our authority to consider defendants' motion.

We also find plaintiff's assertions to be incorrect insofar as it argues that the Ontario Arbitration Act is inapplicable to proceedings in the United States. True, the arbitration clause in the Licensing Agreement does not specify a Canadian forum for arbitration. However, this omission in no way prevents this Court from enforcing the agreement to arbitrate in accordance with the Ontario Arbitration Act, pursuant to the Convention and 9 U.S.C. §206. As previously stated, a district court acting under the Convention has permissive authority to issue an order compelling arbitration in a place specified by the arbitration clause in question, whether within or without the United States. However, the lack of a

specified forum does not prevent a district court from otherwise compelling arbitration in its own district. See Oil Basin, Ltd., supra, (in the absence of a specified forum for arbitration, the district court held that it has combined authority under § 4 of the Act and § 206 of the Convention to compel arbitration in the Southern District of New York). We have similar authority here. Moreover, if we were to compel arbitration in this district, we find no reason to not give effect to the choice of the Ontario Arbitration Act as the law governing arbitration. Section 206 provides that we "may direct that arbitration be held in accordance with the (arbitration) agreement..." We would be compelled to effectuate this choice of arbitration law for the same reasons given by the Supreme Court in Scherk, where the Court enforced a forum-selection clause in an arbitration provision to which the Act applied:

> An agreement to arbitrate before a specified tribunal is in effect, a specialized kind of forum-selection clause that posts not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation if such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."
>
> For all these reasons we hold that agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.

417 U.S. at 519-20, 94 S.Ct. at 245, 41 L.Ed. 2d at 280-81 (citations omitted).

Once again plaintiff's counsel cites authority which provides no support for his client's position. In his argument against applicability of the Ontario Arbitration Act in the United States, he cites Splosna Plovba of Piran v. Agrelak Steamship Corp., 381

F.Supp. 1568 (S.D.N.Y. 1974), for the proposition that this Court cannot honor the choice of arbitration law without a related choice of forum. In Splosna, however, the court held only that the parties implicitly agreed to have British law govern the arbitration proceedings because the arbitration clause specified London as the place of arbitration. Here, we have explicit agreement as to the governing arbitration law and therefore do not need a specified Ontario forum in order to infer the application of the Ontario Arbitration Act.

Plaintiff's counsel continues to misstate and misconstrue the law in discussing the substantive law governing a court's analysis of the arbitration clause. For example, plaintiff states in its brief: "This is not a simple case of choice of (substantive) law....(The Federal Arbitration laws are exclusively applicable, and the substantive laws of the Commonwealth of Pennsylvania will be applicable to the underlying contro-

versy. Erie Railroad v. Tompkins..." Plaintiff's Brief at 4 n.2 (citation omitted). We can not help but wonder if plaintiff's counsel understands the concept of substantive law. First, if we were to apply the principles of diversity jurisdiction, to which plaintiff refers by citing Erie Railroad, Canadian, not Pennsylvania, substantive law would apply pursuant to the choice of law rules outlined in Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S.Ct. 1020, 84 L.Ed. 1477 (1941) (federal court sitting in diversity jurisdiction to apply choice of law rules of forum state), and in view of Paragraph 31 of the Licensing Agreement, which provides: "This agreement shall be construed and be governed by the laws of the Province of Ontario." In applying diversity principles, we would not hesitate to give effect to this contractual choice of law. See Boase v. Lee Rubber & Tire Corporation, 437 F.2d 527 (3d Cir. 1970)

Second, plaintiff's counsel has again

either overlooked or never researched clear precedent in discussing the applicable substantive law when "the Federal Arbitration laws are exclusively applicable." In Becker Autoradio, the Third Circuit clearly defined federal substantive law as applying even though, as we previously noted, the arbitration clause in that case directed the parties to arbitrate in Germany under international rules of procedure, and the contract was to be governed by German law:

> There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. However the case before us presents only the issue of the arbitrability of that controversy. When a contract involves "commerce", as this one does, whether a "suit or proceeding is referable to arbitration... under an agreement (to arbitrate)" pursuant to the federal Arbitration Act, 9 U.S.C. §3, or to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, Art. II, (paragraph) 3 and 9

> U.S.C. § 206, is clearly a matter of federal substantive law. Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law. Concomitantly, questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law. As the court in Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972), stated, "(o)nce a dispute is covered by the (federal Arbitration) Act, federal law applies to all questions of (the arbitration agreement's) interpretation, construction, validity, revocability, and enforceability."
>
> It is true that, if the parties agree that certain disputes will be submitted to arbitration and that the law of a particular jurisdiction will govern the resolution of those disputes, federal courts must effectuate that agreement. However, whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law.

585 F.2d at 43 (citations omitted). See also Moses H. Cone Memorial Hospital, 460 U.S. at 25, 103 S.Ct. at 942, 74 L.d.2d at 785 (citing Becker Autoradio).

II. Limited Scope of the Arbitration Provision

Plaintiff's counsel dig a deeper hole for their client when then attempt to argue that the declaratory judgment action is a controversy outside the scope of the arbitration provision. Based on the aforementioned "argument" that the Ontario Arbitration Act is inapplicable to proceedings within the United States because a Canadian forum was not specified, plaintiff further argues that the "only logical, unrestrained and unambiguous construction of the instant arbitration is that it was intended to apply only to proceedings in Canada." Plaintiff's Brief at 6. Therefore, plaintiff argues, the underlying declaratory judgment falls outside the scope of the arbitration clause. In other words, plaintiff would have us believe that the agreement to arbitrate could be easily and legally thwarted by bringing an action outside Canada. While we agree that a Canadian forum is impliedly selected by the

arbitration provision, this in no way prevents a United States district court from enforcing this agreement. The Licensing Agreement does not call for arbitration of all disputes concerning the Licensing Agreement only if proceedings related to those disputes are begun in Canada. It is plaintiff's counsel who strains the construction of the arbitration agreement and who also strains the patience of this Court. Again, it is remarkable that plaintiff argues that this Court cannot effectuate an express agreement to arbitrate any disputes concerning the Licensing Agreement and the implied intent to arbitrate in Canada via the enforcement mechanisms of the Act and Convention.

C. Arbitrability of This Dispute

Having found that the Act and Convention apply to the Licensing Agreement and that neither the provisions of the Act and Convention nor those of the arbitration clause

are precluded from our consideration, we next move to the question of whether the disputes raised by plaintiff's complaint concern "the interpretation, construction, meaning or effect of" the Licensing Agreement as defined by the arbitration clause. See Becker Autoradi, 585 F.2df at 44 (central issue concerned whether dispute between plaintiff and defendant was within scope of arbitration clause). We note again that federal substantive law governs this inquiry, and, further, that any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be reached in favor of arbitration unless a court can state with "positive assurance" that the dispute was not meant to be arbitrated. Id., at 43-44.

Plaintiff does not contest that the issue it raises by its complaint for declaratory judgment are arbitrable disputes within the meaning of the arbitration clause. neither do we question that the arbitration clause covers the claims raised in

plaintiff's complaint; even if we had some doubt, we could not state with positive assurance that the disputes were not meant to be arbitrated. Therefore, we find the present dispute to be subject to arbitration.

A final factor to be considered before using our authority under the Act and Convention is whether the arbitration agreement"is null and void, inoperative or incapable of being performed." 9 U.S.C. § 201 (II)(1). See also 9 U.S.C. §2 (an arbitration agreement shall be "valid, irrevocable, and enforceable (under the Act), save upon grounds as exist at law or equity for the revocation of any contract."). However, plaintiffs again make no objections based on these considerations, and we find no reason at law to find that the arbitration clause is anything but valid, irrevocable, and enforceable.

Plaintiff does make some statement as to the contract being a form agreement. Plaintiff's Brief at 6. However, this

comment is in no way related to an argument that unequal bargaining existed or that for some other reason the entire contract is legally unenforceable and/or void. Indeed, we note that Thomas R. Eddy was a signatory to the Licensing Agreement as licensee and presume that this is the same Thomas R. Eddy whose name appears on the letterhead of plaintiff's counsel, Eddy & Osterman. See also Defendant's Brief at 7 (Thomas R. Eddy identified as an attorney). Certainly as an attorney and party to the contract, Mr. Eddy knew or should have understood the meaning of the contract and the agreement to arbitrate. Moreover, the Licensing Agreement, a copy of which is attached to plaintiff's complaint as Exhibit A, bears several handwritten changes and notations with Mr. Eddy's initials, among others, at the margins. This evidences free negotiation between the parties and further dispels any concern for unequal bargaining power. Thus, again, we see no reason to find the contract invalid or unenforceable.

D. Conclusion

Accordingly, we find that we are required to exercise our authority under the Act and Convention, pursuant to 9 U.S.C. §§ 3 and 206, to order that the proceedings before this Court be stayed. In addition, we will use our related authority under §206 to issue an order compelling arbitration in Ontario. Although Ontario was not specified as the situs for arbitration we find it to be impliedly selected. The contract expressly provides that it is to be construed and governed by the laws of the Province of Ontario and, further, that arbitration under the contract be governed by the Ontario Arbitration Act. These objective terms indicate an intent that arbitration take place in Ontario, Canada. See Lafayette Coal Co. vs. Gilman Paper Co., 640 F.Supp. 1 (N.D. Ill. 1986) (apparent that parties, while not specifically stating, contemplated arbitration in Georgia where the agreement between

the parties directed that it be construed and interpreted by Georgia law). Defendants have introduced evidence of this implied intent in the Affidavit of Angelo Risi in Support of Motion for Stay Pending Arbitration, filed February 9, 1987. Mr. Risi avers that it was his intent "that any disputes arising pursuant to the licensing agreement would be resolved through arbitration in Ontario, Canada, pursuant to the Arbitration Act of the Province of Ontario, Canada." Affidavit at Paragraphs 3-6, 10. We find further support for our conclusion in cases where courts have implied the reverse - where parties have selected a forum for arbitration and the arbitration laws of that forum have been implicitly recognized. See, e.g., Cheer, 417 U.S. at 519 n. 13, 94 S.Ct. at 245, 41 L.Ed.2d at 280; Fertilizer Corp of India, supra,; Splosna, 381 F.Supp., at 1370. We note that in finding his implicit forum selection the Convention does become

controlling, at least as to our authority to compel arbitration outside this district. Cf. Oil Basin, Ltd., supra.

A appropriate order will issue.

s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DURA-CORP, a Pennsylvania Business Corporation, Plaintiff	)	
v.	)	C.A. No. 86-1610
RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, Defendants	)	

ORDER OF COURT

AND NOW, to-wit, this 1st day of August, 1988, it is hereby Ordered, Adjudged and Decreed, that the within Motion to Open Order, Dismiss Defendants' Motion to Compel Arbitration and Compel Arbitration in the Western Disrtrict of Pennsylvania, be and hereby are denied. Because the Opinion was

not submitted to any publisher, the Motion to Withhold Publication of Opinion is denied as moot.

BY THE COURT:

s/Maurice B. Cohill, Jr.
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DURA-CORP, a Pennsylvania Business Corporation, Plaintiff	)	C.A. No. 86-1610
v.	)	
RISI STONE, LTD., a Canadian Corporation, and ROTHBURY INVESTMENTS, LTD., A Canadian Corporation, Defendants	)	

ORDER

AND NOW, to wit, this 6th day of December, 1988, it is hereby ORDERED, ADJUDGED and DECREED that defendant's Motion to Strike be and hereby is GRANTED. However, it appearing that plaintiff's pleadings are not interposed for improper purposes, the defendant's Motion for Sanctions under Rule

11 of the Federal Rules of Civil Procedure be and hereby is DENIED.

s/Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Chief Judge